

**TOWN OF ROCKY HILL
ZONING BOARD OF APPEALS
MEETING OF MAY 19, 2015**

1. CALL TO ORDER

Chairman Reilly called the Tuesday, May 19, 2015 meeting to order at 7:02 p.m. in the Town Council Room of the Rocky Hill Town Hall, 761 Old Main Street, Rocky Hill, Connecticut.

Present: James Reilly, Chairman
Joe Coelho, Vice Chairman
Phil Benoit, Secretary
Greg Faulkner
Chris Incarvito

Alternates: Jason Bates

Absent: William Tangney

Also: Kimberley A. Ricci, Asst. Zoning Enforcement Officer
Morris Borea, Rocky Hill Town Attorney
Eileen A. Knapp, Recording Secretary

Chairman Reilly went over the procedures for the public hearings and noted that any decision of the Board can be appealed within 15 days of the decision. Secretary Benoit read the legal notice.

1. PUBLIC HEARING

A. Appeal 2015-2, SecureCare Options LLC c/o Jonathon M. Starble, Esq., appealing an order, requirement, or decision of a Zoning Enforcement Officer Under Section 8.7.3 of the Rocky Hill Zoning Regulations for Order dated May 29, 2013, for property located at 60 West Street in a R-20 Residential Zoning District, which Order is claimed, among other things, to have been void ab initio;

B. Appeal 2015-3, SecureCare Realty LLC c/o Jonathon M. Starble, Esq., appealing an order, requirement, or decision of a Zoning Enforcement Officer Under Section 8.7.3 of the Rocky Hill Zoning Regulations for Order dated May 29, 2013, for property located at 60 West Street in a R-20 Residential Zoning District, which Order is claimed, among other things, to have been void ab initio;

Attorney Jonathon Starble from the Law Firm of Starble and Harris, 32 East Main Street, Avon, addressed the Commission representing SecureCare Options, LLC. He submitted information, affidavits and exhibits to the Board. They are here to appeal two Cease and Desist Orders that were issued by Mrs. Ricci in May of 2013. They believe these Orders were issued in violation of a court order that was in existence at the time they were issued. They were also directly contrary to a prior written ruling by the ZEO with respect to this property. The Cease and Desist orders were duplicative of claims that were

already pending in court, in a lawsuit brought by the Town against his clients. Mrs. Ricci has given a deposition and in that transcript she admits that there was a court order in place prohibiting her from issuing or enforcing the Cease and Desist Orders, and that there was no factual basis for these Orders to be issued. There is a nursing home at 60 West Street and this is a use that is allowed at this location since 1967 so there is no violation at this property.

The building has been used as a licensed nursing home continually since 1967 except for a period of time during 2011 and 2012, during which a prior owner had a licensed that was involuntarily deactivated by the State. The property is located in a Residential Zone and is a legal non-conforming use under CGS Section 8-2a. A legal non-conforming use can only lose its zoning status if it is *voluntarily abandoned*. According to Rocky Hills Regulations, Section 7.1.9:

“If any non-conforming land use, building, or structure is not occupied by reason of voluntary discontinuance or abandonment for a continuous period of at least twelve (12) months, then the re-establishment of any future use of the land, building or structure shall be in conformity with the provisions of these Regulations and any amendments thereof, unless the owner can provide evidence that there was no intention to abandon the use.”

Atty. Starble said this building was formerly owned by a large nursing home chain that filed for bankruptcy and the State of Connecticut obtained a receiver for this nursing home, which was still functioning and owned and operated by OHI. The receiver decided the facility should be closed down, which was vigorously opposed by OHI. OHI did not voluntarily discontinue use of the property as a nursing home. They continued to try to market and sell the property as a nursing home. They also notified the Town Assessor in August of 2011 that they had not voluntarily discontinued the use. Patients were moved out and OHI continued to try to sell the site. From October 5, 2011 to November 13, 2012 the property was maintained to be sold as a nursing home. In her deposition, Mrs. Ricci admitted that she has no evidence that they voluntarily abandoned the property. When his clients, SecureCare Options LLC and Secure Care Realty, LLC. became interested in the property Atty. Starble contacted the Town on the issue of the legal non-conforming use and to confirm that the use was not voluntarily abandoned and that it could be legally established after this 12 month period. Mrs. Ricci responded and said, “Regarding the intent to abandon the legal non-conforming use, I am in agreement with you and your reasoning, which indicates that there was no intentional abandonment of the use.” Relying on this response SecureCare ultimately purchased the property in November of 2012. Immediately prior to purchasing the property his clients again asked for written confirmation from Mrs. Ricci, who stated, “The use of the property as a convalescent home is a legal non-conforming use and will be allowed to continue as such.” Secure Care went ahead and purchased the property with the intent of opening a nursing home.

In December of 2012 there was a lot of media attention and speculation that his client was going to have a prison on the site instead of a nursing home. Atty. Starble said this is a nursing home and always was a nursing home, but on December 18, 2012 a lawsuit was brought by the Town against his clients in Hartford Superior Court. According to Statute 17b 372a certain State Agencies have the ability to contract with nursing homes to serve individuals who may be transitioning from State Care, including such places as correctional institutions or the Department of Mental Health. The facility at 60 West Main Street was intended to be open to those types of individuals if they qualified for nursing homes. Part of the Town’s claim in this case was that “any prior non-conforming use of the property has been abandoned.” This statement was in direct opposition to what the ZEO stated in a formal ruling twice before his client purchased the property. Atty. Starble said the concept of municipal estoppels applies in this case because it is a legal term that says if a Town’s authorized agent makes a decision on a matter and a property owner relies on that decision, the Town cannot later renege on that decision. In April of 2013 the Hartford Superior Court ruled that this property wasn’t

subject to zoning regulations at all because of the involvement of the State in this matter. SecureCare was then considered an “arm of the State” and local zoning regulation was preempted. The court order to the Town at that time was that they could not regulate this property. A month later the ZEO, on behalf of the Town, issued Cease and Desist Orders stating that SecureCare was violating the Town Zoning Regulations by operating a prison/penitentiary, nursing home, and/or assisted living facility on the property. Mrs. Ricci admitted in her deposition that neither she nor any Zoning Staff member ever visited the property. There is no evidence that there is anything other than a nursing home operating on the property. Atty. Starble said the issuance of the Cease and Desist Orders were in violation of a Court Order.

In the meantime, in January of 2015, the Superior Court decision was reversed by the Supreme Court who stated that they don’t believe this property is immune from local zoning regulations. The Supreme Court remanded the matter back to the Superior Court to see if, in fact, any zoning violation occurred. Shortly after the Town filed a second lawsuit against SecureCare claiming that the current use of property constitutes a zoning violation and should be stopped. In this new action the Town’s sole basis is that the Cease and Desist Orders were never appealed so they can automatically shut the operation down. Atty. Starble and his clients disagree strongly with the claim that they didn’t respond to the Cease and Desist Orders because at the time there was a Superior Court order saying the use couldn’t be regulated and they feel those letter were invalid at that time, or void ab initio. The Court already said Mrs. Ricci was not authorized to send those Orders. According to the Statute, if you are aggrieved by a decision and the decision can be appealed, you must appeal within 30 days. They are claiming that they were not “aggrieved” by the decision because they believed the Orders were invalid so there was no basis to appeal. When, in January of 2015, they received the second lawsuit, they decided to file an appeal to the ZBA, which was done two days later.

When asked in her deposition, why Mrs. Ricci believed the nursing home was a “prison”, she said patients “are not free to come and go as they please” and that they don’t have the same rights that patients of other nursing homes have. Atty. Starble said if that was her basis for the Cease and Desist Orders, it doesn’t explain why she said SecureCare could not operate a nursing home there. Atty. Starble said the patients at 60 West Street are residents of a nursing home and have the same rights as any other nursing home residents in the State of Connecticut. If this Commission finds that his client should have appealed the decision, they should also find that they did it in a timely manner. Atty. Starble said in his opinion, he believes the Commission should find that these Orders were never real orders because Mrs. Ricci never had jurisdiction to send them. As far as the substance of the Cease and Desist Orders, he feels they should be overturned for several reasons. There was no authority to issue them. The Orders were duplicative because there was already a lawsuit that was filed making the exact same claim. The Orders themselves were not supported by any facts.

Commissioner Faulkner wondered if they have the authority to decide if the Cease and Desist Orders were valid, before they decide on the appeal itself. Atty. Starble suggested that the Board seek an independent legal opinion on that.

Atty. Starble pointed out that this nursing home is serving people that are physically and mentally disabled as in any other nursing home in the State. The only difference that has raised media attention is due to the types of people being cared for here. To not allow this nursing home to operate because of that reason is discriminatory zoning. According to State Regulations a Town cannot make any zoning decisions based on “animus against a protected group”.

Commissioner Benoit asked if his mother or father could be admitted to this nursing home. Atty. Starble said it would not be a problem if they meet the nursing home criteria.

Commissioner Bates asked if the patients are supervised by the Department of Correction. Atty. Starble said they are not supervised in any way and they are not prisoners.

Chairman Reilly asked if they patients are free to leave at any time. Atty. Starble said they have the same rights as any other nursing home.

Commissioner Faulkner asked if the patients are admitted through the Department of Corrections. Atty. Starble said there are patients there who have been referred by certain State Agencies, but the majority of patients are not referred by the Department of Corrections. Commissioner Faulkner

A MOTION was made by Chairman Reilly for a 5-minute recess. Motion was seconded by Commissioner Coelho. All were in favor, MOTION CARRIED UNANIMOUSLY.

Public Comment

Town Attorney Morris Borea, 112 Bittersweet Hill, Wethersfield addressed the Commission representing Mrs. Ricci in the Superior Court Action. The first case was filed before anyone was living at the nursing home after the Town was advised that it would be used for prisoners and/or patients from Connecticut Valley Hospital. This action was filed in advance of anything happening at the property. This was the action that was dismissed by the Court, which was dismissing the Town's action requesting an injunction. It was not an order for the Town to not enforce their Zoning Regulations at this property. There is some language stating that the Zoning Regulations were preempted by State Statutes. Atty. Borea said that is called "dicta", which is something that the court says that is not necessary to get to the result. It is the Town's view that when that court decision was entered they had sovereign immunity meaning only that the Town could not go to court to enforce its Regulations. The Cease and Desist Orders were sent after they received information that there were patients residing at 60 West Main Street. He said the patients there do have the same rights as patients at other nursing homes but they have restricted movement as far as whether or not they can be taken off the property. This is something the Town plans to argue in court.

As far as the issue in front of the Commission, there was a court order stating that SecureCare had immunity, which didn't prevent them from trying to enforce their Regulations. Mrs. Ricci issued a Cease and Desist Order when patients were moved in. It was received by SecureCare, who then wrote to the Town requesting they withdraw the Orders because they have sovereign immunity. The Town responded by saying they aren't withdrawing the Orders and SecureCare should appeal it, which they did not do in the 30 day time period. Atty. Borea said nothing that was going on would have made the Orders void ab initio. The ZEO had the authority to issue the Order and SecureCare did not appeal within 30 days. When the Supreme Court reversed the original decision the Town went to court to enforce the Cease and Desist Order. The applicant should have filed the Appeal within the 30 days and they could have raised their concerns about the validity of the Order at that time. At this point, the case will have to be tried in court, where the Applicant can bring up all of their concerns about the validity of the Cease and Desist Order.

Atty. Borea said occupation of the building was stopped in August of 2011 and it was purchased in November of 2012, which according to Regulations is over the 1 year limit for the issue of

abandonment. The Town disagrees that the abandonment was not voluntary. It is their view that the Receiver took over the property and determined that beds were not needed at this location and the decision was to close this nursing home, in order to keep other nursing homes open.

As far as the issue of whether or not the nursing home is actually a prison, Atty. Borea said this type of patient is not the same level of patient that was previously housed at the nursing home and one rule of Zoning is that you cannot expand a non-conforming use. These patients are on medical parole and if they were to leave the facility, they would have to be picked up by the Police and either returned to the nursing home or prison. Atty. Borea said the bottom line is that they did not appeal the Cease and Desist Order within the 30 day period and now the issue is in Court, where it will all be addressed.

Commissioner Faulkner asked Atty. Borea if the Commission is authorized to determine if the Cease and Desist Orders were valid before they determine if the appeal was filed in a timely manner. Atty. Borea said it is their opinion that the Order was valid, but they are representing the Mrs. Ricci. He said they could also request a second independent legal opinion or they could follow the plain language of the Regulations. Commissioner Faulkner said he doesn't know if the Commission has the authority to render a decision first, that the letter was valid and then from that decision decide if there was a timely appeal. Atty. Borea said if the Commission finds there is an issue with whether or not the Order was valid, they could decline to hear the appeal. Commissioner Faulkner said the matter is currently in front of a Court and he doesn't know what would happen if they make a decision that the Order was or was not void ab initio. Commissioner Faulkner said he was confused how Mrs. Ricci could be allowed to enforce the Town's Regulations while at the same time not violating the Court Order saying the Owners of the nursing home had sovereign immunity. Atty. Borea said "sovereign immunity" simply means the Town cannot sue them and they went to the Claims Commission to ask for a waiver of the sovereign immunity. The claim was not heard and was eventually withdrawn when the court decision was reversed because it became moot.

Ms. Krista Mariner of 58 Farms Village Road addressed the Commission stating that she feels SecureCare purchases the property under false pretenses and deliberately did not disclose the composition of the proposed patient population to the Zoning Enforcement Officer. She believes the operation of 60 West Street is a danger to the safety and welfare of Rocky Hill residents. She believes the Cease and Desist order should stand and not be vacated.

Mr. Joseph Camalieri of 5 Ridge Road addressed the Commission. He attended a Town Hall meeting prior to 60 West Street being occupied and the Governor stated that his mother would not be allowed to go to that facility because it's not that kind of facility. The Governor also said the residents would not be able to leave the facility and wander the neighborhood. Mr. Camaleiri said he believes this is a prison regardless of what the Attorney is claiming. He is opposed to this facility and hopes the Commission acts accordingly.

Mr. Tom Paglesee of 135 Parsonage Street addressed the Commission. He said this is a prison and the primary purpose of this facility is to confine residents.

Commissioner Faulkner asked Atty. Borea to address the issue of the municipal estoppel defense. Atty. Borea said that is defense is one that is extremely difficult to make. It has to be something that the property owner, themselves, could not determine for themselves. The Applicant could have determined for themselves that the property was abandoned and they had no right to rely on what Mrs. Ricci said. He also pointed out that they misled Mrs. Ricci when they asked for her opinion without telling her there would be a different population housed there than what you would normally expect in a nursing home. He said they believe this constitutes an expansion of the use, which is not allowed for legal non-conforming uses.

Atty. Starble said there is nothing in Mrs. Ricci's letters claiming this is an expansion of a legal non-conforming use. Her letters assert that this is a completely different use or that the nursing home use is not allowed. It is not before this Board whether this was an expansion of a legal non-conforming use. That was never alleged by the Town. As far as municipal estoppels, his clients couldn't independently verify whether the Town would take the position that the use could not be re-established as a nursing home.

2. NEW BUSINESS

A. Appeal 2015-2, SecureCare Options LLC, 60 West Street, Rocky Hill, CT

B. Appeal 2015-3, SecureCare Realty LLC, 60 West Street, Rocky Hill, CT

Commissioner Faulkner didn't think it would be appropriate to make a motion regarding the appeals because he would like more clarification on what exactly the Commission has the ability to act upon. He said he is unclear as to whether or not the Commission can make the initial decision as to whether or not there even is a valid Cease and Desist Order that they can hear the appeal on.

Vice Chairman Coelho agreed, stating that he believes they need an outside opinion as to whether or not they should even act on this.

Commissioner Benoit said he believes they should act on the Cease and Desist order.

Commissioner Incarvito said they are being asked to acknowledge that the Cease and Desist order "exists" and then act on whether or not it is valid. But he also feels that, in light of the information, they should table this for an independent opinion.

Commissioner Benoit said he believes that if the ZEO Officer issued the Cease and Desist order, according to Regulations, it should have been appealed within 30 days and it wasn't.

Commissioner Faulkner said the Cease and Desist Order was issued after a Superior Court decision, which the Applicant is stating revoked Mrs. Ricci's right to issue that Cease and Desist Order. If that is true that she had no right to issue the Cease and Desist order, then the Zoning Board of Appeals has no right to hear an appeal on the Order. He said he doesn't know if he has the authority to make the decision that she did or did not have the authority to issue the Order.

A MOTION was made by Vice Chairman Coelho that the Commission seek an outside opinion on whether this Board can act on this cease and desist order. Motion was seconded by Commissioner Faulkner. All were in favor, MOTION CARRIED UNANIMOUSLY.

A MOTION was made by Commissioner Incarvito to table the following appeals:

Appeal 2015-2, SecureCare Options LLC c/o Jonathon M. Starble, Esq., appealing an order, requirement, or decision of a Zoning Enforcement Officer Under Section 8.7.3 of the Rocky Hill Zoning Regulations for Order dated May 29, 2013, for property located at 60 West Street in a R-20 Residential Zoning District, which Order is claimed, among other things, to have been void ab initio;

Appeal 2015-3, SecureCare Realty LLC c/o Jonathon M. Starble. Esq., appealing an order, requirement, or decision of a Zoning Enforcement Officer Under Section 8.7.3 of the Rocky Hill Zoning Regulations for Order dated May 29, 2013, for property located at 60 West Street in a R-20 Residential Zoning District, which Order is claimed, among other things, to have been void ab initio;

Motion was seconded by Commissioner Coelho. All were in favor, MOTION CARRIED UNANIMOUSLY.

Mrs. Ricci noted that the Commission has 65 days to render a decision on this Appeal.

3. OLD BUSINESS

4. ANY OTHER BUSINESS

A. Discussion of ZBA Checklist

The Commission agreed to add a discussion of the ZBA Checklist and Electronic Signs to the next month's agenda.

B. Review of Zoning Regulations Section 3.4.8 temporary structures

No discussion.

5. APPROVE ACTION TAKEN/MINUTES – April 21, 2015

A MOTION was made by Vice Chairman Coelho to approve the minutes and actions of the April 21, 2015 meeting with changes. Motion was seconded by Chairman Reilly. All were in favor, MOTION CARRIED UNANIMOUSLY.

6. ADJOURN

A MOTION was made by Commissioner Incarvito to adjourn the meeting at 9:10 p.m. Motion was seconded by Chairman Reilly. All were in favor, MOTION CARRIED UNANIMOUSLY.